

# State of California



## Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement  
(916) 322-5662 322-5660 322-5901 322-6441

November 6, 1984

William R. Galstan  
City Attorney  
City of Antioch  
P.O. Box 130  
Antioch, CA 94509

Re: Your Request for Information  
Our File No. A-84-241

Dear Mr. Galstan:

Thank you for your request for information concerning the conflict of interest provisions of the Political Reform Act<sup>1/</sup> and, in particular, the Commission regulation on materiality (2 Cal. Adm. Code Section 18702).

Section 87100 of the Act provides that a public official may not make, participate in making, or use his or her official position to influence a governmental decision in which the official has a financial interest. An official has a financial interest in a decision when it is reasonably foreseeable that the decision will have a material effect on any of the following financial interests:

(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000).

(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000).

(c) Any source of income, other than loans by a commercial lending institution in the regular course of business on terms available to the public without

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<sup>1/</sup> The Political Reform Act is contained in Government Code Sections 81000-91014. All statutory references are to the Government Code.

William R. Galstan  
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regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

#### Section 87103.

An employee of a business entity who also owns stock in the business (such as the situation you described in your letter) must refrain, in his or her duties as a public official, from making or participating in any decisions which could materially affect that business. This is true even if the decision will not affect the amount of income the official receives nor the value of the official's stock.

By regulation, the Commission has provided monetary guidelines for determining whether a potential effect of a decision on a business entity is material. 2 Cal. Adm. Code Section 18702(b)(1). There are three tests: the gross revenues test, the net income test, and the assets and liabilities test. You expressed concern about the gross revenues test. This test provides that an effect is material if it equals or exceeds 1 percent of the business' annualized gross revenues except that an effect of \$100,000 or more on any business entity is considered material. This test has been used as a presumption of materiality in the case of very large business entities since the regulation was originally adopted in 1977.

In your letter, you discussed more specifically the application of this test to a large utility company such as PG&E and PacTel. One of your concerns is that a person employed by one of these utilities who serves as a planning commissioner or councilmember would never be able to participate in decisions on subdivision maps or any substantial commercial or industrial use matter because the new homes or other developments would generate over \$100,000 gross annual revenues to the utility. It is true such an official could not participate in any decision allowing development that would create over \$100,000 in gross revenues to the city. However, it does not preclude all land use decisionmaking by the official, and I have enclosed a copy of a recent advice letter which discusses these issues.

We have received many comments similar to yours, and it is our view that the Commission should consider amending the

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regulation to provide for a higher threshold for materiality for very large businesses. We have been studying the issue for several months and plan to propose amendment to 2 Cal. Adm. Code Section 18702 in the near future. I will place your name on the list of interested persons so that you will receive notices and drafts of all proposed changes. We will provide your letter and any additional comments you wish to make to the Commission when it considers any proposed amendments.

Please feel free to call me if I can be of further assistance or if you wish additional information.

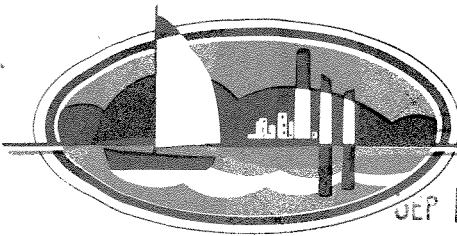
Sincerely,

A handwritten signature in cursive script, appearing to read "Diane Maura Fishburn", with a long horizontal flourish extending to the right.

Diane Maura Fishburn  
Staff Counsel  
Legal Division

DMF:plh  
Enclosure

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CITY HALL THIRD AND H PO 130

WILLIAM R. GALSTAN  
City Attorney

September 17, 1984

Robert E. Leidigh  
Staff Counsel  
Fair Political Practices Commission  
P.O. Box 807  
Sacramento CA 95804

**Re: Conflict Problems for Utility Company Employees**

Dear Mr. Leidigh:

I enjoyed very much your article in the September, 1984, issue of **Western Cities** magazine. I look forward to your upcoming articles as well.

One particular problem regarding conflict of interest has recently arisen in my City regarding employees of utility companies. As you know, it is a common practice for such employees to own stock in PG&E or Pac Tel as part of their compensation package. It has recently come to my attention that the FPPC views any decision which may increase or decrease the gross annual revenue of a company by \$100,000 to be a material financial effect.

A member of our Planning Commission who is running for City Council in the November election is a management employee at a local PG&E power plant and owns more than \$1,000 worth of PG&E stock. If I understand the "material effect" rule correctly, this person would never be able to vote upon a subdivision map, or any substantial commercial or industrial use, because the new homes or shopping center or industry would generate \$100,000 gross annual revenue to the company.

As you may know, these types of decisions are among the most common -- and most critical -- that local planning commissioners and city council members make. If the individual were precluded from making these kinds of decisions, there would be very little point for him serving on either the Planning Commission or the City Council.

Robert E. Leidigh, Staff Counsel  
Fair Political Practices Commission  
September 17, 1984  
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This rule seems to work a manifest unfairness, because it seems that the effect of such local decisions on an individual's stock investment, compared with the gigantic operations, income and losses of a utility like PG&E would be miniscule. Indeed, the profits or losses of the company depend in large measure on decisions of the Public Utilities Commission.

During my 11 years of practice representing three California cities, I have had the pleasure of working with several planning commissioners and councilmen who happened to be PG&E employees (and I presume stockholders). Without qualification, I can say that those individuals were among the most responsible and articulate members of those bodies, and ironically in this context, among the more conservative and environmentally-responsible on issues of local growth and development.

I would appreciate your comments on whether my analysis of the "material effect" rule is correct, which would lead to disqualification on the subjects I mentioned. This is not a formal request for an opinion from the FPPC.

If the analysis is correct, I would strongly urge the FPPC to review its regulations so that an exception is made for employees of large publicly-regulated utilities. It seems to me that the conflict should apply when the utility itself is an applicant, such as when it wants to build a power plant, operations center, etc. I believe that there currently is such an exception for employees of banks.

I appreciate your interest in what I perceive as a statewide problem.

Very truly yours,

*William R. Galstan*

WILLIAM R. GALSTAN  
City Attorney

WRG/kw

cc: Kate Sproul, Staff Attorney, League of California Cities

# State of California



## Fair Political Practices Commission

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(916) 322-5662 322-5660 322-5901 322-6441

September 19, 1984

William R. Galstan  
Antioch City Attorney  
P.O. Box 130  
Antioch, CA 94509

Re: Your Request for Advice,  
Our Advice No. A-84-241

Dear Mr. Galstan:

Your letter requesting advice under the Political Reform Act has been referred to Diane Maura Fishburn, an attorney in the Legal Division of the Fair Political Practices Commission. If you have any questions about your advice request, you may contact this attorney directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

  
Barbara A. Milman  
General Counsel

BAM:plh

CHARLES J. WILLIAMS  
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December 10, 1984

Barbara A. Milman  
General Counsel  
Fair Political Practices Commission  
P. O. Box 807  
Sacramento, CA 95804

Re: Your File No. 8-84-241; Ownership of Utility Company Stock

Dear Ms. Milman:

The Commission's letter of November 6, 1984, to William R. Galston, City Attorney of Antioch, has been brought to my attention.

The regulation and your advice letter deal with the affect of 2 Cal. Adm. Code §18702(b)(1) upon disqualification of a public official. A public official is disqualified if he is an employee of or holds a stock investment of \$1,000 or more in a business entity and the effect of the public official's decision will be to increase or decrease the annual gross revenues of the corporation by \$100,000 or more. We understand that in the case of large business entities such as stock exchange listed companies, the Commission has used this test as a presumption of materiality and that the regulation has been in effect since 1977.

The concern that we have is the application of this regulation and the presumption of materiality to large corporations in which the increase or decrease by \$100,000 or more is of no consequential effect when related to the annualized gross revenues of the corporation. As the regulation reads, a public official who holds \$1,000 worth of stock in a large public utility cannot vote on the approval of a subdivision where the gross revenues to be produced by the homes which will be built in that subdivision would add up to \$100,000 or more a year.

How can I or indeed any other local governmental agency attorney advise its public officials as to when the approval of a subdivision is likely to result in the increase of gross revenues to the public utility serving that subdivision in the future by \$100,000 or more. The question is impossible to answer at the time the City or County is approving the subdivision. Will the subdivision (whether residential, industrial or commercial) be built? What public utility rates will be in effect at the time the structures are utilized and how are these rates to be determined? Is the public agency obligated to inquire into the energy saving devices in the proposed structure in order to calculate an estimate of what revenues the structure might create?

Barbara A. Milman  
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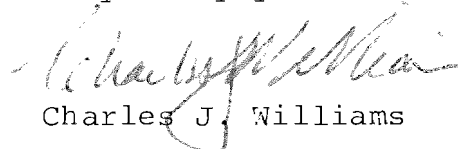
These are all matters which are outside of the scope of the public agency in approving a private development.

The same problems inherent in complying with the regulation to private subdivisions which will be served by a public utility can easily be extended to other potential private entities which might benefit from other kinds of land use decisions. For example, in the rezoning of a shopping center, if the private developer has a proposed lease with a major department store such as Macy's, a public official owning \$1,000 worth of stock in Macy's would be disqualified. Developers are often reluctant to disclose large tenants with whom they have successfully negotiated or are negotiating with as tenants. Is the local zoning authority obligated to compel a disclosure of those who have signed firm leases before the project has been approved?

I would urge the Commission to proceed rapidly with an amendment to §18702 of the California Administrative Code so that these issues are clarified, particularly with reference to land use decisions.

In the meantime, I am more concerned about the position of the Commission with regard to officials who may have taken action in the past or who may do so in the future in the situations I have referred to above. In particular, it would seem that the Commission should exempt these kinds of actions which have been taken where there is no direct relationship between the entity whose gross revenues may be increased or decreased and the decision which is being made by the local governmental agency and where the decision will not immediately affect the annualized gross revenues of the business entity. In other words, public officials should be immune from enforcement action pending an amendment to your regulations in the kinds of situations I have described because there is no way of knowing whether or not the annual gross revenues of a business entity having no direct relationship with the public agency's decision will be affected in the manner contemplated by section 18702.

Very truly yours,



Charles J. Williams

CJW:ss

cc: Honorable William Baker, Assemblyman  
Honorable Daniel Boatwright, State Senator  
Gary Chase, Town Manager of Moraga  
George Gaekle, City Manager of Lafayette  
Anthony Donato, City Manager of Pittsburg  
Michael Davis, City Manager of Danville